

**ADMINISTRATIVE APPEAL DECISION FOR
APPROVED JURISDICTIONAL DETERMINATION
FOR THE MAREK PROPERTY**

Steamboat Springs, Colorado

Sacramento District File Number 200175341

August 29, 2003

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California

District Representatives: Anthony Curtis, Frisco Colorado field office; Sue Nall, Grand Junction, Colorado field office; and Ken Jacobson, Grand Junction, Colorado field office.

Appellant Representative: Kent Crofts, IME Consulting, Yampa, Colorado

Authority: Clean Water Act (CWA), Section 404 (33 U.S.C. 1344)

Receipt of Request For Appeal (RFA): May 14, 2003

Appeal Meeting Date: July 10, 2003

Site Visit Date: July 10, 2003

Background Information: The Marek Property is an approximately 8.8-acre, roughly rectangular, property located south of Twenty-Mile Road in Section 7, Township 6 North, Range 84 West, Routt County, Colorado, and located approximately 600 feet southwest of the Yampa River in a predominantly industrial area of Steamboat Springs, Colorado. The Appellant and the District agree on the boundaries of wetlands on the property that meet the definition of wetlands in accordance with the Corps 1987 Wetland Delineation Manual. The District considers wetlands on the property within CWA jurisdiction as tributary to and/or adjacent to the Yampa River. The Appellant considers any wetlands or waters on the property to be isolated waters with an insufficient connection to interstate commerce to be within the jurisdiction of the Clean Water Act.

Summary of Decision: I conclude the District's current administrative record did not provide substantial evidence that the wetlands on the Appellant's property were adjacent to waters within CWA jurisdiction nor that there was a tributary connection within CWA jurisdiction extending between the Appellant's property and the Yampa River. I found the administrative record supported the District's conclusion that the Yampa River was within CWA jurisdiction. The District is directed to reconsider its determination of the extent of areas within CWA jurisdiction on the Appellant's property.

Appeal Evaluation, Findings and Instructions to the Sacramento District Engineer (DE):

Reason 1: The Appellant asserts the Yampa River should not be considered within CWA jurisdiction because it is not a “primary” tributary to a water of the United States. The Appellant asserts that since the U.S. Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (2001) (*SWANCC* Decision), only primary tributaries to waters of the United States remain within CWA jurisdiction.

FINDING: This reason for appeal did not have merit.

ACTION: None required.

DISCUSSION: The District considered the Yampa River to be within CWA jurisdiction under 33 CFR 328.3 (a) (2) which defines interstate waters as within CWA jurisdiction and 33 CFR 328.3 (a) (5) which defines tributaries to interstate waters as waters within CWA jurisdiction. The Yampa River is a tributary to the Green River, an interstate river. The Green River is a tributary to the Colorado River, another interstate river. The District and the Appellant agree that there is an ordinary high water mark (OHWM) that extends continuously from the Colorado River to the Green River, and on to Yampa River upstream of the Marek property.

The Appellant’s request for appeal used the arguments advanced in the *United States v. Newdunn*, 195 F. Supp. 2d 751 (E.D. Va. April 3, 2002), appeal pending, Nos. 02-1480, 02-1594 (4th Cir.) and several other federal court decisions discussed in the Environmental Protection Agency/Department of the Army Joint Memorandum of January 15, 2003 (Appendix A to the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States” – Federal Register Vol 68, pages 1995 – 1998) (Joint Memorandum) to support his claim that the Yampa River was not within CWA jurisdiction because it was not a “primary” tributary to a navigable water of the United States. (Note: The Appellant used the term “primary tributary” as defined in the Corps 1975 regulations as quoted in *United States v. Newdunn*, as “the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries.”).

The Joint Memorandum considered the *United States v. Newdunn* decision, other federal court decision cited by the Appellant including *United States v. Rapanos*, 190 F. Supp., 2d 1011 (E.D. Mich. 2002), which was reversed by the United States Court of Appeals for the 6th Circuit on August 5, 2003 (Note: *United States v. Rapanos* had been previously remanded for reconsideration to the U.S. District Court without decision by the U.S. Supreme Court and the United States Court of Appeals for the 6th Circuit after the *SWANCC* Decision in January 2001). The Joint Memorandum also considered federal court decisions more supportive of the District’s position in this matter in providing guidance regarding the appropriate determination of CWA jurisdiction.

Based on an evaluation of all those decisions the Joint Memorandum provided guidance directing that (Fed Reg Vol 68, page 1998):

“Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands).“

The District’s conclusion that the Yampa River is within CWA jurisdiction is clearly consistent with Corps regulations at 33 CFR 328.3 (a)(2) and (a)(5) that define a tributary to an interstate water as a water within CWA jurisdiction. The District and the Appellant agreed that the Yampa River had an ordinary high water mark that extended continuously to the Green River, which is a tributary to the Colorado River. Both the Green River and Colorado River are interstate rivers. The Joint Memorandum states that *Colvin v. United States* 181 F. Supp 2d 1050 (C.D. Cal. 2001) provides examples of tests for traditional navigable waters. The Yampa River also clearly falls within tests outlined in *Colvin v. United States* to be traditional navigable water within jurisdiction of the CWA. This reason for appeal did not have merit.

Reason 2: The District incorrectly concluded that there was a tributary connection within CWA jurisdiction between the Marek property and the Yampa River, because no OHWM was present in the channel connecting those areas.

FINDING: This reason for appeal had merit.

ACTION: The District must reconsider its prior evaluation that a tributary connection within CWA jurisdiction exists between the Marek property and the Yampa River including collection of new information if needed, and consideration of the factors identified in this appeal decision.

DISCUSSION: The District and the Appellant agree that some surface water flows north from the Marek property through a 36-inch culvert under the Moffet Ave/Twenty Mile Road and subsequently flows northwest through a series of drainage channels approximately 1000 feet long, and several culverts, to reach the Yampa River. The District and Appellant agree that surface water enters the Marek property from direct surface precipitation, runoff from the small hills to the southwest, from springs and seeps located at the base of the hills to the southwest, from an off-site roadside channel, and from snowmelt from the City of Steamboat Springs snow storage facility, located approximately 400 feet southeast of the site (which stores substantial amounts of snow in high snowfall years).

The Appellant asserts that the roadside channel that flows from southeast to northwest along the northeast boundary of the property to the 36-inch culvert had relatively little hydrological influence on the property since it consists of relatively impermeable clayey soils (administrative record page 94). This channel is also at a higher elevation than most

of the property as shown by topographic maps in the administrative record and does not appear to flow into the wetlands on the property.

The wetlands on the property are located at slightly lower elevations than the roadside channel and drain to the west-northwest as identified by the Appellant and the District, ultimately reaching the 36-inch culvert at the northwestern corner of the property and connecting to the roadside channel. The District's administrative record does not document the presence, absence, or extent of the OHWM in the roadside channel or between the 36-inch culvert, and subsequent channels extending to the Yampa River. The District considers the surface water route through the 36-inch culvert at the northwest corner of the property and through the series of channels to the Yampa River to be tributary connections within CWA jurisdiction. The Appellant disagrees with this interpretation because he has concluded that no OHWM exists between 36-inch culvert on the property and Yampa River.

The Corps regulations at 33 CFR 328.4 (c) identify the limits of jurisdiction in non-tidal waters of the United States as extending to the ordinary high water mark, except when adjacent wetlands are present, in which case it extends to the limit of the adjacent wetlands. The District considered several documents in reaching its conclusions that the roadside channel and wetlands on the Marek property were within CWA jurisdiction. The District asserts that the federal court decision in *Headwaters v. Talent Irrigation*, 243 F.3d 526 (9th Cir. March 12, 2001) supports its conclusion. In *Headwaters v. Talent Irrigation* the 9th Circuit considered a stream which contributes its flow to a larger stream or other body of water to be a tributary and concluded that irrigation canals in that action were waters of the United States within CWA jurisdiction because they exchanged water with the natural stream. The Appellant stated he believed that *Headwaters v. Talent Irrigation* was based on facts that were sufficiently distinguishable from the Marek property that it should not be applicable.

The District also stated it used information provided in a Corps of Engineers Headquarters Office of Counsel e-mail of August 20, 2002, which includes a diagram of several different jurisdictional issues, and relevant federal court decisions that related to those issues. However, the Corps of Engineers Headquarters Regulatory Office in its Headquarters/Division Teleconference call of August 28, 2002 (Teleconference notes) stated that the Office of Counsel August 20, 2002 e-mail was not complete, and was not to be considered specific guidance for individual sites. Most of the federal court decisions identified in that August 20, 2002 e-mail were subsequently addressed in the Joint Memorandum, which was issued as guidance.

The Joint Memorandum is the most recent Environmental Protection Agency/Department of the Army guidance regarding CWA jurisdiction over tributaries, adjacent wetlands and isolated waters. The Joint Memorandum includes an evaluation of CWA jurisdictional issues including court decisions based on CWA Section 402 and Section 404 and states that (Fed Reg Vol 68. page 1997) that:

“A factor in determining jurisdiction over waters with intermittent flows is the presence or absence of an ordinary high water mark (OHWM). Corps regulations provide that, in the absence of adjacent wetlands, the lateral limits of non-tidal waters extend to the OHWM (33 CFR 328.4 (c) (1). One court has interpreted this regulation to require the presence of a continuous OHWM. *United States v. RGM* 222 F. Supp. 2d 780 (E.D. Va. 2002) (government appeal pending).”

Since the Joint Memorandum does not explicitly require a continuous OHWM in all cases, (and the Environmental Protection Agency’s definition of waters within CWA jurisdiction at 40 CFR 232.2 does not include any discussion of the presence or absence of an OHWM at all), it appears possible that the District could reasonably conclude in some cases that a tributary connection establishing CWA jurisdiction could exist without a continuous OHWM. However, since the Corps regulation regarding the use of an OHWM has not been rescinded, the District should have addressed how the presence or absence of an OHWM on the Marek property, and in the channel between the property and the Yampa River, affected its CWA jurisdictional determination for this property.

I conclude the District insufficiently documented that there was a tributary connection between the Marek property and the Yampa River. The District should reconsider its determination regarding whether or not there is a tributary connection within CWA jurisdiction between the Marek property and the Yampa River including, but not limited to, consideration of the following: (a) does a continuous or discontinuous OHWM exist between the 36” culvert exiting the Marek property and the Yampa River, (b) if a discontinuous OHWM exists between the Marek property and the Yampa River, why did the District consider that sufficient evidence that a tributary within CWA jurisdiction was present, (c) If no OHWM is present, but the District still believes there is a tributary connection within CWA jurisdiction between the Marek property and the Yampa River, explain the basis for that conclusion, (d) explain whether there are one or more jurisdictional tributaries that extend onto the property, and if so, depict the locations of these tributaries on a map of the area, (e) consider the guidance in the Joint Memorandum regarding federal court decisions concerning CWA jurisdiction, such as the *SWANCC* Decision and *United States v. Riverside Bayview* (U.S. 121, 106 S. Ct. 455) 1985, as well as federal court decisions on the subject issued after publication of the Joint Memorandum including, but not limited to *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) and the recent reversal of *United States v. Rapanos*, and (f) consider any additional information the Appellant may provide on this subject. Consideration of additional information from the Appellant as part of a remand and District reevaluation of an approved JD does not establish any additional administrative appeal rights for the Appellant.

The District should also reconsider whether it has consistently handled the CWA jurisdictional status of all the drainage channels on the property. The District’s initial December 3, 2001 CWA jurisdictional determination for this property identified the drainage channel on the northeastern boundary of the property as jurisdictional, as well as two unimproved road stormwater ditches that are located on each side of a dirt road crossing the property from southwest to northeast. The District’s subsequent CWA

jurisdictional determination of December 20, 2002 removed the two “unimproved road stormwater ditches” and stated they were “man-made structures and have been maintained during the life span of the road.”

It is unclear whether the roadside channel on the northeast boundary of the site could also be accurately described as an unimproved road stormwater ditch that is a man-made structure maintained over the life of the road, as were the two roadside ditches that were found to be outside CWA jurisdiction in the District’s December 20, 2003 approved JD. The approved JD currently under appeal specifically referenced these prior approved JDs as accurate. However, the current approved JD and the administrative record do not explain why the roadside channel along the northeastern property boundary was within CWA jurisdiction, while the two other apparently similar roadside channels were outside CWA jurisdiction.

The District must reconsider and further document its decision regarding the CWA jurisdictional status of these three roadside channels as the current administrative record does not clearly explain why one of the channels is within CWA jurisdiction, and two, apparently similar channels, are excluded from CWA jurisdiction. The result of the District’s reconsideration of this action must provide its basis for including or excluding some or all these roadside channels from CWA jurisdiction. In reevaluating these ditches the District should consider the Corps prior guidance on the CWA jurisdictional status of ditches. The Preamble to the Corps 1986 regulations (Federal Register Vol. 51, page 41217) and the Reissuance of the Nationwide Permits in 2000 (Federal Register Vol 65, page 12825) both state that the Corps *generally* does not consider non-tidal drainage and irrigation ditches excavated on dry land to be waters of the United States within CWA jurisdiction.

Reason 3: The Appellant asserts that the District has incorrectly determined that the wetlands on the Marek Property are adjacent wetlands and believes that the wetlands are actually isolated wetlands with an insufficient connection to interstate commerce to be within CWA jurisdiction.

FINDING: This reason for appeal had merit.

ACTION: The District must reconsider its conclusion that the wetlands on the Marek property are adjacent to either the Yampa River or a tributary to the Yampa River as described in this appeal decision.

DISCUSSION: The Appellant asserts that the wetlands on the Marek property are isolated wetlands outside of CWA jurisdiction because the Yampa River is not within CWA jurisdiction (this issue is addressed under Reason 1 above), because there is no tributary connection on the property that the wetlands can be adjacent to (this issue is addressed under Reason 2 above), because the Appellant considers the wetlands on the Marek property too distant from the Yampa River to be adjacent wetlands (addressed here), and because there have been prior District determinations that this site and similar

nearby areas have previously been determined to be isolated wetlands (addressed under Reason 4 below).

The Corps regulations at 33 CFR 328.3 (c) define adjacent wetlands as:

“(c) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes *and the like* are “adjacent wetlands.” ”
[Emphasis added]

The adjacency concept was further discussed in the Preamble to the Corps 1977 regulations 42 Fed Reg page 37129 (1977), which stated:

“...we have defined the term “adjacent” to mean “bordering, contiguous, or neighboring.” The term would include wetlands that directly connect to other waters of the United States, or *that are in reasonable proximity* to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, *and similar obstructions.*” [Emphasis added]

The District’s approved JD of March 15, 2003 states:

“The wetlands on the James Marek property are tributary to and/or adjacent to the Yampa River, that is, they flow into the Yampa River...”

The District’s March 15, 2003 approved JD refers to the District’s JDs of December 3, 2001 and the subsequent amendment issued December 20, 2002 (which deleted some “unimproved road stormwater ditches” as outside of CWA jurisdiction) as accurate depictions of the jurisdictional wetlands. The District’s December 3, 2001 and March 15, 2003 letters both identified that the wetlands on the Marek property were adjacent to the Yampa River.

The District’s position is that the wetlands on the Marek property are within reasonable proximity to the Yampa River to be adjacent wetlands based on their position in the landscape (at approximately the same elevation as the Yampa River) and similar ecological situation. The District’s supporting data for this position is limited. The District had previously identified wetlands on a property (the Lindow property) located between the Marek Property and the Yampa River. The District considers this evidence that the wetlands on the Marek property are within reasonable proximity to be adjacent wetlands.

The District also submitted aerial photographs dated July 11, 1972, October 11, 1979 and October 25, 1994 as clarifying information regarding the extent of wetlands on the Marek property and Lindow property. These photographs were inconclusive as to prior distribution of wetlands between the Marek property and the Yampa River.

On July 29, 2003, the Appellant submitted additional information responding to the District's assertion at the appeal meeting that the Marek property and the Lindow property had a "similar ecological situation." The Appellant asserts that the Lindow property was associated with old river oxbows. The Appellant asserts that the wetlands on the Marek property were associated with toe of the slope groundwater discharges, were always separated from the Lindow property by intervening uplands, and therefore cannot be considered adjacent to the Yampa River. Appellant stated that the two properties had different soil types and plant communities prior to development.

I concluded that the Appellant's information regarding a comparison of soil types and plant communities between the Marek and Lindow properties was new information that I could not consider during the appeal. However, I also found that the District's conclusion that the wetlands on the Marek property were adjacent because they were in a similar position in the landscape to be insufficiently documented.

The District must reconsider its determination that the wetlands on the Marek property are adjacent to the Yampa River. If upon reconsideration, the District believes that the wetlands on the Marek property are adjacent to the Yampa River as the remnant of a once continuous wetland or broad continuum of wetlands extending from the property to the Yampa River, the District must provide supporting documentation that it is reasonable to conclude such a continuous wetland once existed, including evidence such as soils, plant communities, and hydrology regimes that would have supported a continuous wetland area or broad continuum of wetlands, and whether the size and shape of the natural sinuosity of the Yampa River in the vicinity, and/or other factors regarding whether the wetlands on the Marek property are within reasonable proximity to the Yampa River.

The Appellant should be afforded an opportunity to provide information regarding those issues before the District makes its decision. Consideration of such materials from the Appellant does not alter that this a District reconsideration of a remanded approved JD, and does not establish any additional administrative appeal rights for the Appellant. If the District concludes that the wetlands on the property are adjacent to a tributary to the Yampa River, rather than the Yampa River itself, the District must explain why it believes a tributary connection within CWA jurisdiction is present as discussed under Reason 2 above, and why it is appropriate to consider wetlands on the Marek property adjacent to that tributary.

Reason 4: The Appellant asserts that the District has incorrectly determined that the wetlands on the Marek Property are adjacent to the Yampa River or a tributary to the Yampa River because the wetlands receive most or all of their water from upgradient, rather than from the Yampa River.

FINDING: This reason for appeal did not have merit.

ACTION: None required.

DISCUSSION: The Appellant has asserted that since the wetlands on the Marek property received most of their water from upgradient, or upstream, rather than from the Yampa River, that these wetlands should be considered isolated wetlands rather than wetlands adjacent to the Yampa River. The Appellant based this on his interpretation of the following explanatory statement in the Preamble to the Corps 1991 “Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits: Final Rule (Federal Register V. 56. No 226. Page 59113) that states:

“In tributary systems where there exists one or more defined channels, any wetlands which are not isolated should be considered adjacent to the waterbody(s). In these cases, the determining factor as to which of the waterbodies the wetland should be considered adjacent to should be the level of influence between the waterbody and the adjacent wetland.”

The Appellant asserts that the areas upstream of the wetlands on the Marek property exert a greater hydrological influence on the wetlands on the Marek property than does the Yampa River, because they provide more water to the wetlands than does the Yampa River. The Appellant then asserts that the upstream seeps, drainage channels, and the runoff from the City of Steamboat Springs Snow Storage area, the “waterbodies” the Appellant believes the wetlands should be properly considered adjacent to, are not within CWA jurisdiction. By extending this reasoning the Appellant also concludes that the wetlands on the Marek property are also outside of CWA jurisdiction.

This is an incorrect interpretation of the explanatory material from page 59113 of the Preamble to the Corps 1991 Federal Register notice quoted above. The clarifying explanation, as stated above, was only to be applied to “...tributary systems where there exists one or more defined channels...” such as at the confluence of river systems, or braided river channels. Those conditions are not present in the area associated with this approved JD.

The Appellant’s proposed approach is also contrary to the Supreme Court’s approach in *United States v. Riverside Bayview*, in which the Court stated that:

“...the Corps ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the (Clean Water) Act. *This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. ... For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters.*” (Parentheses and italics added) and...,

“In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment *even when the moisture creating the wetlands does not find its source in the adjacent bodies of water.*” (Italics added)

The Appellant’s proposed alternative conclusion that the wetlands on the Marek property cannot be within CWA jurisdiction as adjacent to the Yampa River because the wetlands

receive most of their water from upslope, rather than from the river, is inconsistent with the available guidance on this topic. The District interpretation of this policy issue was consistent with current federal CWA guidance on this topic.

Reason 5: The District's approved jurisdictional determination is arbitrary and capricious because it is inconsistent with past District jurisdictional decisions in the area that found that this property and similar areas were isolated waters outside of CWA jurisdiction.

FINDING: This reason for appeal did not have merit.

ACTION: None required.

DISCUSSION: The Appellant's consultant has worked extensively on CWA Section 404 permitting and jurisdictional issues in Steamboat Springs, Colorado area. Based on his past experience and information gathered from the Corps of Engineers computer database of permitting actions by Freedom of Information Act requests, the Appellant believes that the District has previously determined that the Marek property and similar properties were isolated waters and the District has no basis to change that determination at this time. The Appellant identified 21 files that he considered to be evidence that the District had considered specific areas to be isolated waters, and asserted that these should be considered supporting evidence that wetlands on the Marek property were isolated wetlands that had an insufficient connection to interstate commerce to be within CWA regulatory jurisdiction.

The Corps regulations at 33 CFR 330.2 (e) define isolated waters as having the following characteristics:

“(e) (1) Not part of a surface tributary system to interstate or navigable waters of the United States; and

“(e) (2) Not adjacent to such tributary waterbodies.”

The Appellant's assertion was that areas in the immediate vicinity, including some sites that were located closer to the Yampa River than the Marek property, had been determined to be isolated waters. The Appellant considered this further evidence that the Marek property contained isolated wetlands with an insufficient connection to interstate commerce to be within CWA jurisdiction rather than adjacent wetlands within CWA jurisdiction.

The Review Officer reviewed 18 of the 21 complete District files the Appellant identified as supporting his position that the Marek property and other areas along the Yampa River had been determined to be isolated waters. Three of the files had been lost or misplaced, and the Review Officer reviewed excerpts from two of the three lost files provided by the Appellant. The Appellant stated that the wetlands on the Marek property were between approximately 530 feet to 890 feet from the Yampa River. The Appellant identified data

from other Corps actions in the vicinity suggesting that wetlands closer to the Yampa River than those found on the Marek property had been determined to be isolated wetlands.

The Review Officer reviewed the Appellant's conclusions regarding the information from prior Corps regulatory actions in the vicinity and found two substantive reasons to reject them.

First, the Appellant did not account for the differences in elevation of the surrounding land on the north and south sides of the Yampa River. In the vicinity of the Marek property, the elevation increases more rapidly north of the Yampa River as compared to the south side of the Yampa River. The Appellant provided lateral distances to areas he claimed the District identified as isolated waters or wetlands on both sides of the Yampa River. The Appellant then asserted that since the distance to the wetlands on the Marek property were greater than to some of the areas the District previously identified as isolated wetlands, that the wetlands on the Marek property must be isolated too. The Appellant's approach does not provide reliable evidence as to whether the wetlands on the Marek property are adjacent to waters within CWA jurisdiction. It does not consider that a wetland close to the river, but higher in elevation above it, could be an isolated wetland, while a wetland further from the river, but only a few feet above it, could be an adjacent wetland.

Second, the Appellant's primary source of data for concluding that the District has previously identified areas as "isolated wetlands" was based on the District's data entries in its computerized permitting database, rather than a detailed evaluation of the individual project files. The Review Officer evaluated this information and found it was unsuitable for this use as described below.

The Appellant submitted specific excerpts from District files number 198800074 Steamboat Springs Public Works Shop and 199275052 Steamboat Snow Storage Area, which he believes show the District previously identified portions of the Marek property as "isolated wetlands." Closer examination of these files did not support the Appellant's conclusion.

In District file 198800074, the City of Steamboat Springs letter of July 29, 1988 submitted by the Appellant states the City identified an area in which they would like to stockpile snow as "above the headwaters of the Yampa River" and the District responded in a letter of August 4, 1988 that it is responding concerning the disposal of snow in "isolated waters," and stated that no permit was required for that action. The Appellant considers this an example that the District considered the Marek property isolated wetlands/waters for jurisdictional purposes. It appears more likely that the wetlands were considered within CWA jurisdiction, were identified as "isolated wetlands" because they were above the headwaters of a tributary to the Yampa River, as explained in more detail below, and that no permit was required for the snow storage activity because the storage of snow was not considered a discharge of dredged or fill material requiring a permit.

The District file 199275052 excerpt provided by the Appellant includes an August 20, 1992 letter to the City of Steamboat Springs with a wetland delineation map. However, no statement in the letter, and no indication on the map, states that the wetland areas shown are isolated wetlands. Only in the District's computer data entry is the wetland identified as an "isolated wetland."

Another specific example demonstrating that the database entries might not accurately represent whether or not an area was an isolated water, was the Clutterbug Storage project (District File #19975247). The computer data entry for this site identified it as an “isolated wetland.” However, the file map of this wetland reviewed at the appeal meeting showed a typical dendritic (tree-shaped) pattern that was wide at the higher elevation and narrower at the lower elevation. This wetland likely could have been categorized as within Clean Water Act as adjacent to a tributary to a water of the United States. The Review Officer identified similar discrepancies in many of the other files evaluated.

The District explained at the appeal meeting that the data entered in the Corps of Engineers permitting database for the Grand Junction, Colorado, field office prior to and soon after the issuance of the *SWANCC* Decision with the identifier of “isolated wetland,” was an unreliable indicator of whether or not a specific action met the regulatory definition of an isolated water. This is because the Grand Junction office’s use of the data notations “isolated wetland” and “isolated water” has changed over time.

Mr. Ken Jacobson, long-time employee of the District’s Grand Junction office, stated that prior to issuance of the *SWANCC* Decision the field office sometimes used the term “isolated water” in the database in a manner that was not consistent with the Corps of Engineers regulatory definition of an isolated water. Mr. Jacobson stated that the term isolated waters had been used by the Grand Junction field office both to describe areas of isolated waters meeting the regulatory definition of an isolated water and to indicate a permitting action for a wetland area above the headwaters of a stream being filled in accordance with the Corps Nationwide Permit 26 (before that permit expired). The District’s explanation was consistent with the results of the Review Officer’s review of the District’s files and contradicted the Appellant’s assertion that these files provided evidence that the Marek property was an isolated water.

The District acknowledged that its prior data entry standards might not have been exactly consistent with the Corps regulatory definition of isolated waters, but that it was how the Grand Junction Regulatory Office had previously entered data in the Corps of Engineers computer permitting tracking system. This data entry was distinct from the information in the project file that indicated whether an action was on a tributary or an isolated water. Mr. Jacobson explained that permitting data entry had become more refined since the *SWANCC* Decision.

In any case, even if the Marek property had previously been determined to contain isolated wetlands, if the current evidence regarding the property appropriately supported the conclusion that the wetlands were a tributary to, or adjacent to, a water within CWA jurisdiction, it would be appropriate to supercede the prior determination and consider the Marek property within CWA jurisdiction. The Review Officer found the District had reasonably rejected the Appellant’s assertion that determinations from other Corps CWA jurisdictional determinations in the vicinity provided definitive evidence that the Marek property was outside of CWA jurisdiction as isolated wetlands. I concur with that determination.

Reason 6: The Appellant asserted the District’s basis of jurisdiction determination did not meet the requirements of 33 CFR 331.2.

FINDING: This reason for appeal had merit

ACTION: The District will issue a revised statement of its basis for jurisdiction for the Marek property after a reconsideration of the prior approved JD if it concludes that CWA jurisdiction exists on the property.

DISCUSSION: The Appellant asserts that the District's basis of jurisdiction statement in the approved jurisdictional determination as defined at 33 CFR 331.2 was flawed because the District did not address all the factors discussed in the Corps Regulatory Program definition of a basis of jurisdiction for an approved JD. I concluded in Reasons 2 and 3 above that the District had insufficient documentation to reach some of its conclusions and the District did not provide details in its basis of jurisdiction for those items. The Appellant is correct that the prior approved JD provided an insufficient basis of jurisdiction statement.

If upon reconsideration of this action, the District still concludes that all or part of the Marek property is within CWA jurisdiction, the District is directed to specifically include its basis of jurisdiction the indicators of a tributary connection and/or indicators of adjacency that establish CWA jurisdiction for the property. If the District issues a subsequent JD, a simple statement reiterating that the District and the Appellant previously agreed on the wetland areas that met Corps 1987 Manual wetland definition during the administrative appeal would be sufficient information for that portion of the basis of jurisdiction. The Corps regulations do not require that a District address every basis of jurisdiction in every approved JD. However, the intent in providing that material to an affected party requesting an approved JD is clearly for the District to summarize the supporting documentation regarding its decision.

Reason 7: The District's approved JD was flawed because they did not respond to the Appellant's requests for guidance regarding the criteria applicable to the Corps regulatory definitions of tributaries, adjacent waters, or isolated waters.

FINDING: This reason for appeal did not have merit

ACTION: None required

DISCUSSION: The extent to which the District provided guidance to the Appellant regarding CWA requirements is not germane to the question of whether or not the District's conclusions regarding this approved JD were reasonable.

Information Received and its Disposition During the Appeal Review:

- 1) The Appellant identified 21 District files that he believed supported his position that the District had previously considered wetlands in the vicinity of the Marek property to be isolated waters. The Review Officer was able to locate 18 of 21 of those files, which are identified in the appeal meeting summary for this appeal. Those 18 files, along with materials provided by the Appellant from two of the other files he identified were considered clarifying information and evaluated as part of this appeal.

- 2) The District submitted aerial photographs of the property dated July 11, 1972, October 11, 1979, and October 25, 1994. These photographs were considered clarifying information. Additional symbols and arrows annotating the 1994 photograph were considered new information and were not considered.
- 3) The District submitted a record of a June 16, 2003 site visit to the property and accompanying photographs. These were considered new information and not considered during this appeal.
- 4) The Appellant stated that he had soils and vegetation information that demonstrated that the District's conclusion that the wetlands on the Marek and Lindow properties were located in a similar ecological situation was incorrect. However this information was not provided to the District prior to issuance of the approved JD, is not in the administrative record, and is considered new information. Therefore the Review Officer did not consider it or attempt to obtain it.

(Note: The items identified here as new information can be considered by the District as part of its reconsideration of this action.)

Conclusion: I have found that portions of the District's decision on the current approved JD for this action are not supported by substantial evidence in the administrative record. The District should reconsider its CWA jurisdictional determination for this action as described in this administrative appeal decision. Should the District identify substantial evidence that CWA jurisdiction is present on all or part of the property, the District should issue a more thoroughly documented approved JD explaining that conclusion. Alternatively, the District should issue a revised approved JD explaining that a lesser amount or no area of the property is within CWA jurisdiction.

Original signed by

Joseph Schroedel
Colonel (P) U.S. Army
Commanding